



Date: **August 10, 1999**

Case No.: **1999-TLC-5**

*In the Matter of:*

**JESSE MENDOZA**  
**d/b/a AVERY FARM SERVICE**  
Respondent,

BEFORE: John M. Vittone  
Chief Administrative Law Judge

### **DECISION AND ORDER**

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and its implementing regulations, found at 20 C.F.R. Part 655.<sup>1</sup> This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. § 655.112(a)(2).

#### **Statement of the Case**

Jesse Mendoza, doing business as Avery Farm Service ("Respondent") filed an H-2A application with both the U.S. Department of Labor's Region IV office and the Region IX office for temporary alien agricultural labor certifications for employment in Georgia and Florida respectively. Upon written notices both dated July 15, 1999 and July 16, 1999, Respondent's applications were denied.

By separate letters dated July 19, 1999 to this Office, the Region IV Regional Administrator, and the Region IX Regional Administrator ("RA"), Respondent amended these application as allowed by the RAs' rejection notifications. The amended applications also requested review of the denials. The Region IV RA reviewed the amended application and again rejected it on July 26, 1999. The certified file was then forwarded to this office and received on August 3, 1999. No action has been taken on the amended application filed with the Region IX RA. According to the RA's brief and the certified file, Respondent filed the same application with the Region IX office as it had with the Region IV office.<sup>2</sup> Accordingly, the certified file was forwarded to this office and received

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<sup>1</sup>Unless otherwise noted, all regulations cited in this decision are in Title 20.

<sup>2</sup>It is noted that this office did receive what appears to be an amended application involving the Region IX  
(continued...)

on August 4, 1999, as it had not received an amended application regarding its denial. This Office is thus only reviewing the original denial of July 15, 1999 as to the Region IX denial.

Via telephone, Respondent has requested an expedited review of both applications pursuant to § 655.112(a). Accordingly, the parties were given until August 9, 1999, to file any briefs or position papers and were informed that no additional evidence would be accepted with those briefs pursuant to the regulations. § 655.112(a)(2). Briefs were received from the RAs' on August 9, 1999. Respondent chose to let his request for administrative review, which he had filed with his amended applications, serve as his position paper.

### *Original Denials*

Respondent's applications were originally denied for a number of similar reasons. First, the applications were untimely. The anticipated starting date of employment listed on both applications was August 15, 1999. The applications were received in the Region IX Office and the Region IV Office on July 2, 1999 and July 9, 1999, respectively. According to the regulations, the applications must be received no later than sixty (60) days in advance of the anticipated starting date. § 655.101(c). Also, the period of anticipated employment exceeded nine (9) months, also in violation of the regulations. § 655.101(b)(1). Respondent further failed to complete the section of the application regarding anticipated hours of work per week. § 653.501(d)(2)(iii). Neither application referenced an "Hours and Earnings" statement. § 655.102(b)(8). Neither application contained referral instructions for workers who wish to apply for the positions. § 655.101(c). The housing to be provided had not been inspected and a conditional access request had not been included. § 655.102. Further, on both applications, the activities and pay rates listed on the Form ETA 790 and those listed in the attachments were inconsistent, and each listed activities to be performed in more than one state. §§ 655.101(b)(1); 655.102(b); and 653.501(2). Finally, the Region IX application was also rejected for failing to provide a Federal farm labor contractor certificate of registration indicating that Respondent was authorized to house, transport, and drive. §§ 655.103(b) & 653.104(b).

### *Modified Applications*

Respondent timely filed modified applications on July 16, 1999. In these modifications, Respondent separated the Region IV and the Region IX applications, which previously had presented mixed duties and locations. Respondents also made some corrections in an attempt to comply with the original denials.

### *Second Denial - Region IV*

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<sup>2</sup>(...continued)

denial. This amended application was nearly identical to the one filed with the Region IV office that is ruled deficient in this decision. However, as new evidence may not be received on appeal, it will not be considered. § 655.112(a)(2). Further it is noted that this amended application was never properly served on the Region IX office. Accordingly, it has not been ruled on by the RA.

The amended modification was rejected by the Region IV Regional Administrator on July 26, 1999. Again, the modification was rejected for a number of the same reasons. First, the application was again denied for failing to have the housing inspected and not including a conditional access request. Second, there were again no referral instructions for workers who wish to apply for the positions. Third, Respondent failed to correctly complete the section of the application regarding anticipated hours of work per week. Fourth, Respondent again failed to provide a Federal farm labor contractor certificate of registration indicating that he is authorized to transport workers and failed to provide a statement from each grower who will use his services indicating that they agree to comply with all of the provisions of his application.

In addition, other violations were noted for the firsttime. The amended application provided inconsistent numbers regarding the number and type of workers requested. § 655.101(b). The amended application also failed to identify the number of hours and the rate of pay which will be provided to the worker for the first week of work. § 653.501(d)(2)(A). Finally, the Respondent did not accurately complete one of the attachments in regards to other conditions of employment and training. § 655.102.

### **Discussion**

#### *Region IV Application*

Pursuant to a telephone conversation with the RA, Respondent indicated that he wanted his original request for review that was included within his modified application to be considered as a request to review the denial of the modified application. Despite having modified the application, Respondent failed to correct a number of deficiencies previously indicated by the RA.

First, the application was found to be deficient as the housing to be provided had not been inspected and a conditional access request had not been included. The regulations require that the employer provide to workers “who are not reasonably able to return to their residence within the same day” accommodations without charge. § 655.102(b)(1). These accommodations are required to meet “the full set of DOL Occupational Safety and Health Administration standards” or the applicant must apply for conditional access to the intrastate or interstate clearance system by giving assurances that the housing will meet these standards at least thirty (30) days prior to occupation. §§ 655.102(b)(1)(i) & 654.403. Respondent’s application merely states that accommodation will be provided “by Del Monte for Avery Farm Service [see attached].” (AF 38). No further information is given, and no attachment showed such an agreement. In fact, the service agreement between Avery Farm Service and Del Monte specifically states that:

the Service Provider agrees that it shall provide: (i.) at its sole expense whatever other ancillary equipment, supplies, transportation and/or facilities that are required in connection with the Services including, without limitation, off-site housing for the Farm Production workers[.](AF 53).

Accordingly, the RA, not having information as to the location of any accommodations or even if they are being provided, could not verify whether these accommodations met OSHA

standards. As Respondent did not attach a conditional access request, denial on this ground was appropriate.

The next ground for denial was that the application did not contain referral instructions for workers who wish to apply for the positions. Specifically, the employer left Items 15 and 19 on ETA Form 790 blank. (AF 26). Regulations involving the H-2A application process specifically require the regional office to immediately begin recruiting U.S. workers to fill the requested positions. § 655.101. Without referral instructions, no such efforts may be undertaken. When informed of this problem, Respondent modified by listing a contact with the Georgia Department of Labor's job service. However, this is exactly the sort of person who needs the information in order to contact Respondent with people willing to accept this employment. By failing to completely fill out this information in the proper manner, Respondent failed to meet the statutory requirements for H-2A applications.

Respondent also failed to properly complete the section of the application regarding anticipated hours of work per week on modification. Specifically, Respondent has listed inconsistent hours of employment on ETA Forms 750 & 790. Originally, Respondent listed 10 hours of work per week on ETA form 750 and 60 hours of work per week on ETA Form 790. (AF 1 & 31). The regulations specifically require that the Respondent provide the anticipated period and hours of employment. § 653.501(d)(2)(iii). By failing to fully and consistently complete these sections, Respondent again failed to meet the regulatory standards regarding H-2A applications.

Finally, Respondent again failed to submit a valid Federal farm labor contractor certificate. The certificate submitted by Respondent in the modified application expires October 31, 1999. (AF 34). The amended application included a starting date of November 1, 1999, so the certificate would expire prior to the initiation of the employment. (AF 1). According to the regulations governing H-2A applications, Respondent must "comply with applicable federal, State, and local employment-related laws and regulations, including employment-related health and safety laws." § 655.103(b). According to the Migrant and Seasonal Agricultural Worker Protection Act, a contractor that is going to transport workers under its provisions must provide a valid Federal farm labor contractor certificate before an application may be received. § 653.104(b). Accordingly, as stated in the RA's brief, without such an application, Respondent is not eligible to file an H-2A application. *See* ETA Handbook No. 398 at II-24-25. As Respondent has not provided a certificate that will be valid throughout the time of the employment, the H-2A application must be denied.

In addition to failing to correct a number of the original deficiencies outlined in the original denial, more deficiencies were discovered by the RA upon further review.<sup>3</sup> The first of the newly discovered deficiencies involved an inconsistency in the number and type of workers sought by Respondent. Specifically, Respondent indicated that he needed 200 workers, of which 150 were to be individual and 25 family. (AF 31). As simple arithmetic demonstrates, this totals 175 people, not the 200 people sought. The inconsistency violates § 655.101(b) which requires an applicant to list the total number of workers it anticipates employing.

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<sup>3</sup>These deficiencies, as discussed *supra*., were deficient in the original filing as well.

Next, Respondent failed to list the number of hours and rate of pay to be provided to the workers for the first week of work. Item 9(f) on ETA Form 790, Attachment 1 was left blank. This information is required to be provided by § 653.501(d)(2)(v)(D). Again, this failing means that Respondent has failed to meet the regulatory requirements for these applications.

Finally, Respondent failed to indicate the amount of training that would be provided to the employees. Specifically, Respondent indicated that it would “allow 10 of work for worker to reach picking standards.” (AF 33). This number could be hours, days, or even weeks. Again, the regulations require that this information be listed, which is why the form requests it. § 655.102. For this reason, as well as all of those listed above, it is clear that the amended application fails to completely adhere to the regulatory requirements. Accordingly, the RA’s denial was appropriate. § 655.104(b).

### *Region IX Application*

As stated above, since Respondent failed to submit an amended application to the Region IX RA, and since the amended application included with the request sent to this Office may not be considered as new evidence may not be accepted, only the original application and its denial are under review. Having reviewed the certified file and the RA’s and Respondent’s position papers<sup>4</sup>, it is determined that the RA’s denial must be upheld for a number of reasons.

First, Respondent failed to timely file his application. The regulations provide that the H2-A application should be filed “no less than 60 calendar days before the first date on which the employer estimates that the workers are needed.” § 655.101(c)(1). The application filed with Region IX was filed on July 2, 1999. The first date of need indicated in that application was August 15, 1999. (AF 21-22). Respondent acknowledges that this was untimely, but requested in his request for review that the “timetable” be waived for their California operation. (AF 2). The time period may be waived if “emergency situations” exist that excuse the delay in filing. § 655.101(f)(2). However, as Respondent has failed to provide any such circumstances, such as unforeseen changes in market conditions, a waiver is not justified, and the application must be denied as untimely.

Second, the application was denied as its period of employment exceeds nine months. Specifically, the denial stated that “Our national office has determined that the intended period of employment should not exceed nine months unless the employer can substantiate the employment is not intended to continue indefinitely, nor is it essentially on a year-round basis.” (AF 22). Previously, it was held that the establishment of such a rule by ETA was not arbitrary, insofar as the RA’s letters of denial permitted Employers the opportunity to rebut its findings. It was not actually a rule, but a “red flag,” which required further justification from the applicant in order to prevent abuses of the H-2A program. *Kentucky Tennessee Growers Assoc., Inc.*, 1998-TLC-1 (December 16, 1997). Such is the case in this situation. Respondent did not supply this information to the Regional Office. Accordingly, the application is deficient.

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<sup>4</sup>Again, it is noted that the amended Region IX application mailed directly to this Office is not being reviewed as new evidence may not be accepted. § 655.112(a).

Third, Respondent failed to properly complete the section of the application regarding anticipated hours of work per week. Specifically, Respondent has inconsistent hours of employment on ETA Forms 750 & 790, listing hours per week on these forms as 10 hours and 60 hours respectively. Further, Respondent failed to indicate a normal quitting time for the work schedule on Item 11 of ETA Form 750. (AF 24-26). The regulations specifically require that the Respondent provide the anticipated period and hours of employment. § 653.501(d)(2)(iii). By failing to fully and consistently complete these sections, Respondent failed to meet the regulatory standards regarding H-2A applications.

Further, Respondent's job offer failed to reference any "Hours and earning statements." The regulations specifically require that such information be provided to the workers on or before each payday information regarding the hours offered to the employee and that employee's rate of pay, *inter alia*. § 655.102(b)(8). "Every job offer which must accompany an H-2A application" should always include this information. § 655.102(b). Since this information was never provided, the application again failed to meet the regulatory standards.

The next ground for denial was that the application did not contain referral instructions for workers who wish to apply for the positions. Specifically, the employer left Item 15 on ETA Form 790 blank. (AF 26). Regulations involving the H-2A application process specifically require the regional office to immediately begin recruiting U.S. workers to fill the requested positions. § 655.101. Without referral instructions, no such efforts may be undertaken. This ground of denial must thus be upheld.

The application was further found to be deficient as the housing to be provided had not been inspected and a conditional access request had not been included. The regulations require that the employer provide to workers "who are not reasonably able to return to their residence within the same day" accommodations without charge. § 655.102(b)(1). These accommodations are required to meet "the full set of DOL Occupational Safety and Health Administration standards" or the applicant must apply for conditional access to the intrastate or interstate clearance system by giving assurances that the housing will meet these standards at least thirty (30) days prior to occupation. §§ 655.102(b)(1)(i) & 654.403. Respondent's application merely states that accommodation will be provided at "motels that will be centrally located to the place where the harvesting will be conducted." (AF 35). No further information is given. Accordingly, the RA, not knowing which hotels were intended, could not verify whether these accommodations met the OSHA standards. As Respondent did not attach a conditional access request, denial on this ground was appropriate.

The Region IX application was also rejected as the activities and pay rates listed on the Form ETA 790 were inconsistent and that it listed activities to be performed in more than one state. The regulations specifically provide that any H-2A application must be filed with the regional office "in whose region the area of intended employment is located." § 655.101(a). Employer filed the same application with each site. Only on modification did Employer attempt to separate the two applications. However, as Employer failed to file a modified application correcting this problem with the Region IX office, this ground for denial must stand.

Finally, Respondent has failed to submit a valid Federal farm labor contractor certificate. The certificate submitted by Respondent expires October 31, 1999, well before the end of the prospective employment period. (AF at 39-40). According to the regulations governing H-2A applications, Respondent must “comply with applicable federal, State, and local employment-related laws and regulations, including employment-related health and safety laws.” § 655.103(b). According to the Migrant and Seasonal Agricultural Worker Protection Act, a contractor that is going to transport workers under its provisions must provide a valid Federal farm labor contractor certificate before an application may be received. § 653.104(b). Accordingly, as stated in the RA’s brief, without such an application, Respondent is not eligible to file an H-2A application. *See* ETA Handbook No. 398 at II-24-25. As Respondent has not provided a certificate that will be valid throughout the time of the employment, the H-2A application must be denied.

### **Conclusion**

Each of these applications contained a number of deficiencies and inconsistencies. So many, in fact, that the RA’s were unable to uncover all of them during the limited time available to review such applications, as evidenced by the further problems found with the Region IV application after the modified application was filed. In both instances, the RA’s were correct in determining that these applications did not meet the regulatory requirements and should thus be denied pursuant to § 655.104(b). Further, both RAs informed Respondent of these deficiencies and omissions and afforded him the opportunity to amend his application. Instead of correcting these mistakes, some of which merely required Respondent to completely fill out the forms provided, Respondent chose to challenge the determinations. However, Respondent has failed to present any rationale as to why the regulatory requirements were incorrectly or inappropriately applied to these applications. The RA’s appropriately looked at the number of omissions and errors and determined correctly that temporary labor certifications could not be issued based on these applications.

Accordingly, the following Order shall enter.

### **ORDER**

The Regional Administrators’ denial of temporary alien agricultural labor certifications is hereby **AFFIRMED**.

at Washington, DC

**JOHN M. VITTONE**  
*Chief Administrative Law Judge*

JMV/jcg